Supreme Court, U.S.
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No. 93-408

In The

Supreme Court of the United States

October Term, 1993

KEN MEEK,

Petitioner,

vs.

GEM BOAT SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A writ of certiorari should be denied, because the only viable question presented by this case – whether, to protect the integrity of class action proceedings arising under state law, an Ohio trial court abuses its discretion by imposing sanctions on class counsel who, among other misconduct, on two separate occasions, invaded the province and responsibility of the court to "direct to the members of the class the best notice practicable" – is entirely a question of Ohio law.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

In addition to those Opinions listed in the Petition, the following is relevant to this proceeding:

Meek v. Gem Boat Service, Inc. (Jan. 24, 1992), C.P. Ottawa Cty. Ohio No. 24146, unreported.

STATUTES AND REGULATIONS

This action involves Rule 23 of the Ohio Rules of Civil Procedure, the text of which is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The instant Petition for Writ of Certiorari ("Petition") is the final step in the second appeal in this case raising issues regarding the errant conduct of petitioner Ken Meek's counsel, David A. Pheils, Jr., in connection with the class certification notice requirement of Rule 23(C)(2) of the Ohio Rules of Civil Procedure ("Civ.R.").[1]

In May of 1989, Pheils prepared and distributed to potential class members a "Rule 23 Notice" ("1989 Notice") purportedly "directed by the Court." Despite the fact that the 1989 Notice gave the appearance that it had been sent by the court, the trial court had not

[1] Except for its division (F), which is not involved in this case, Civ.R. 23 is identical to Rule 23 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

directed the 1989 Notice and had not approved its contents. The 1989 Notice was also untimely; it was sent after Visiting Judge Gilson had already granted Plaintiff's Cross Motion for Partial Summary Judgment on the issue of liability (a ruling which was later reversed on appeal). Further, the 1989 Notice told recipients that they had already won and the accompanying May 31, 1989 cover letter told them that they would automatically receive damage awards – less a 40 percent fee Pheils had awarded himself. As a result of this seriously flawed Notice, Gem Boat Service, Inc. nka Gem Beach Marina, Inc.[2] ("Gem Beach"), respondent herein, filed a motion to vacate class certification, which the trial court denied.

A hearing on damages ensued and, on August 23, 1989, the trial court entered final judgment in the sum of $360,378.75 (treble the verdict returned by the jury, pursuant to Ohio statute). Gem Beach appealed to the Court of Appeals for Ottawa County, Ohio. In response to Gem Beach's third assignment of error (claiming that Judge Gilson had erred in denying defendant's motion to vacate the class certification), the Court of Appeals found nothing in the record indicating that Pheils had sent the 1989 Notice to potential class members pursuant to court order. The Court of Appeals concluded that Pheils had prepared and sent the 1989 Notice without court approval; as a result, it held that Civ.R. 23(C)(2) had not been complied with and, therefore, this action should not have proceeded as a class action. *Meek v. Gem Boat Service, Inc.* (Sept. 14, 1990), Ohio App. Ottawa Cty. No. 89-OT-32,

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[2] Gem Boat Service, Inc. nka Gem Beach Marina, Inc. has no parent company and no subsidiaries.

unreported ("*Meek I*"). Thus, there was no need for the Court of Appeals to rule on Gem Beach's concerns relating to the timing and content of the 1989 Notice.

Finding both Gem Beach's first assignment of error (directed to Judge Gilson's liability ruling) and third assignment of error well-taken, the Court of Appeals reversed the trial court's judgment and remanded this case to the trial court for further proceedings not inconsistent with its decision. The Supreme Court of Ohio denied Meek's motion to certify the record of the case to it. *Meek v. Gem Boat Service* (Feb. 13, 1991), Ohio Supreme Ct. No. 90-2193.

On remand, the trial court (now Judge Moon) ordered Pheils and the attorneys for Gem Beach to prepare and file with the trial court a new proposed notice to be sent to prospective class members to advise them, in an objective manner, of the status of the litigation and of their right to opt out of the class. The attorneys were unable to agree on a proposed notice. Gem Beach then filed Defendant's Report to the Court Re: Notice to Potential Class Members, to which was attached its proposed Amended Rule 23 Notice to Potential Class Members. Similarly, Meek submitted Plaintiff's Motion for the Court to Adopt Plaintiff's Proposed Second Notice, to which was attached his proposed Second Rule 23 Notice to Class Members.

On May 29, 1991, the trial court selected and executed the class certification notice proposed by Gem Beach ("1991 Notice"), thereby rejecting the form and content of the notice proposed by plaintiff.

Although the trial court issued no order empowering him to do so, Pheils proceeded to mail out the court's 1991 Notice to the potential class members.[3] Unbeknownst to Gem Beach, and without the trial court's knowledge or authorization, Pheils sent the court's 1991 Notice as an "enclosure" to his own personal cover letter and questionnaire. *See* Petition at 18-24.

While the 1991 Notice approved by the trial court neutrally and objectively set forth the information required by Civ.R. 23(C)(2), and was not suggestive of the probable outcome of this action (*see* Petition at 25-28), Pheils's cover letter and questionnaire defied those standards. The cover letter and questionnaire were obviously designed to discourage potential class members from opting out, contained false and misleading information in several respects, and undermined portions of the court-approved 1991 Notice. In short, as shown below, by sending his unauthorized, misleading and biased materials in the same envelope with the court-approved Notice, Pheils sabotaged the trial court's attempt to notify potential class members of the nature of the case and their options in an accurate, neutral and objective manner, as required by Civ.R. 23.

Specifically, in his cover letter, Pheils misrepresented the nature and extent of damages the members of the class are eligible to recover. The court's 1991 Notice accurately told potential class members that, under the Court of Appeals' decision in *Meek I*, they might recover to the

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[3] Contrary to his assertion at page 1 of the Petition, Pheils did the mailing, *not* "plaintiffs."

extent they demonstrate Gem Beach charged excessive or unreasonable water and sewer fees, subject to Gem Beach's defenses. Pheils erroneously claimed in his letter, however, that the Court of Appeals had ruled that class members could also recover for other types of alleged damages, such as alleged instances of inadequate water and sewer service and "mental distress" and "humiliation" from such service. The Court of Appeals did not so rule, as was subsequently confirmed by Judge Moon.[4]

The trial court's 1991 Notice properly expressed no opinion as to the merits of plaintiff's claim. Pheils, in sharp contrast, opined twice that, on remand, the jury would probably return a much larger verdict for the class than had occurred in earlier proceedings.

The trial court's 1991 Notice neutrally explained that potential class members may participate in this action or elect not to participate. Pheils threatened that those who opt out may be barred by "statute of limitations problems raised by Defendant" from pursuing their claims separately. This was misleading in two respects. First, the statute of limitations defense which defendant has raised would apply equally to persons who elect to participate in this action and to those who choose to opt out. Second, since "the filing of a class action suspends the applicable

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[4] By Journal Entry filed October 3, 1991, the trial court granted Gem Beach's Motion for Partial Summary Judgment on the issue of damages. The trial court determined therein that, under the relevant statutes, "[p]laintiffs have no right to prove damages generally. . . . Plaintiffs have no right to prove adequacy or inadequacy of services, or quality or lack of quality of services." Thus, plaintiffs are not entitled to the types of damages described in Pheils's cover letter and questionnaire.

statute of limitations for all class members," *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984) (citations omitted), and this case was filed less than five months after the finish of the underlying administrative proceeding, persons who chose to opt out would have had some seven months to pursue their claims separately.

More importantly, though, Pheils's (mis)statement to potential class members that their *separate* claims would be time-barred violated the trial court's May 29, 1991 order approving the form and content of the notice submitted by defendant. Pheils raised this issue in his Motion for the Court to Adopt Plaintiff's Proposed Second Notice. By approving defendant's (and not plaintiff's) form of notice, the trial court implicitly rejected Pheils's contention that potential class members needed to know about defendant's statute of limitations defense to make an intelligent choice between participating and opting-out.

Finally, Pheils represented that he was sending the 1991 Notice on the court's behalf, "[p]ursuant to Order of the Court." In fact, as both the trial court and the Court of Appeals found, no such court order existed.[5]

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[5] In addition, Pheils neglected to advise the absent class members that, for their protection, attorney fees in successful class actions for money damages are determined by the court, not by arrangement between class counsel and certain of the absent class members. *See* Petition at 19; H. Newberg, 3 *Newberg on Class Actions* § 15.16 at 15-48 (3rd ed. 1992) ("the court awards class action fees pursuant to its inherent equity powers").

Gem Beach then filed a motion for sanctions against Pheils because of his misconduct.[6] A hearing on the motion was held on September 12, 1991.

In its Judgment Entry, the trial court found that:

1. As was the case in *Meek I*, Pheils had sent out the 1991 Notice without any court order empowering him to do so (App. 5-6); and

2. Pheils's cover letter and questionnaire contained "misleading contents" and "self serving misrepresentations," and "[t]he contents of the cover letter and questionnaire are a gross and egregious perversion of the requirements of objective notice set out in Civil Rule 23(C)(2) and of the objective notice selected by the Court." App. 6.

The trial court observed that Pheils's actions placed the case "in the very same posture that it was in when the case came back from the Court of Appeals over two years ago," (App. 6) and that the damage done by Pheils could well be irreparable:

> If this case is ever to proceed to resolution, are we to send yet a third mailing to the potential class members? If we do eventually *order* a notice out, how do we explain in any meaningful way to the beleaguered class the prior two false starts? More troubling is how any revised notice can adequately and objectively inform the potential class of the status of the case and

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[6] Contrary to the assertion at page 1 of the Petition, Gem Beach's motion for sanctions sought no sanctions against the named plaintiff or potential class members, and none were awarded, as the Court of Appeals affirmed. *See* Petition at 16.

> cleanse from their collective psyche the utter rubbish contained in the cover letter and questionnaire.

App. 7 (emphasis in original).

The trial court then issued the sanction order set forth at page 2 of the Petition. Further, the trial court retained jurisdiction of this cause and gave plaintiff thirty days to secure new counsel and cause him or her to enter an appearance in this case.

Meek appealed to the Court of Appeals for Ottawa County, Ohio. In a unanimous Opinion and Judgment Entry filed February 12, 1993, the Court of Appeals affirmed the trial court's sanction order. The appellate court found that the trial court had sanctioned Pheils for two distinct reasons:

1. He "improperly sent notice of the class action to potential class members without a court order," Petition at 17;

2. He "included statements in communications sent to potential class members which indicated an inability of the counsel to adequately represent the class." *Id.*

As to each of these distinct grounds, the Court of Appeals held that, in sanctioning Pheils, the trial court had not abused its discretion. Petition at 15, 16.

With respect to the first reason for Pheils's removal, the Court of Appeals cited its previous ruling "that Civ.R. 23(C)(2) contains 'mandatory language . . . [which] indicates that the court must order that a notice be sent. However, we find nothing improper with the court ordering a party to send the notice.' " Petition at 15. Noting

that Pheils, who participated in *Meek I*, was aware of that ruling and that "nothing in the record reflects any action taken by the court to either send the [1991] notice directly, or to order appellants' counsel to send the notice," *id.*, the court below concluded:

> Therefore, *appellants' counsel's action* of sending the notice, accompanied by a cover letter from counsel and a questionnaire drafted by counsel of the prospective class members, without prior court approval, *resulted in the second commission of an error which had already required the reversal of this case for remedial action.*

Id. (Emphasis added.) The court below held that "[t]he trial court did not act in an unreasonable, arbitrary or unconscionable manner, therefore, when it ruled that attorney Pheils's actions required his removal from the case and from further participation in the case, so that the court could protect the integrity of the proceedings." *Id.*

With respect to the second reason for Pheils's removal, the court below concluded that, based on the harmful effects of the misleading contents and self-serving misrepresentations of the cover letter and questionnaire Pheils mailed to potential class members with the 1991 Notice, the trial court "could reasonably conclude . . . that attorney Pheils was no longer competent to protect the interest of the class or to continue representation of the class," Petition at 16, and that it acted responsibly, protecting the rights and interests of the class, when it disqualified Pheils. *Id.*

Finally, the Court of Appeals held that Pheils's contention that the trial court's sanctions infringed upon his First Amendment rights was without merit. The trial

court's actions "did not constitute any prior restraint, as the communications had already occurred." Petition at 16. Moreover, the court below disagreed with Pheils's contention that the trial court had imposed sanctions on him as a punishment for communicating with clients. The Court of Appeals found that the trial court had sanctioned Pheils because he "had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent the class members." *Id.*

The Supreme Court of Ohio denied Meek's motion to certify the record of the case to it "for the reason that no substantial constitutional question exists therein." *Meek v. Gem Boat Service* (June 23, 1993), Ohio Supreme Court No. 93-719.

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE ONLY VIABLE QUESTION PRESENTED BY THIS CASE – WHETHER, TO PROTECT THE INTEGRITY OF CLASS ACTION PROCEEDINGS ARISING UNDER STATE LAW, AN OHIO TRIAL COURT ABUSES ITS DISCRETION BY IMPOSING SANCTIONS ON CLASS COUNSEL WHO, AMONG OTHER MISCONDUCT, ON TWO SEPARATE OCCASIONS, INVADED THE PROVINCE AND RESPONSIBILITY OF THE COURT TO "DIRECT TO THE MEMBERS OF THE CLASS THE BEST NOTICE PRACTICABLE" – IS ENTIRELY A QUESTION OF OHIO LAW.

The facts of this case demonstrate that Pheils was sanctioned for two distinct reasons. First, the trial court

found that, on two separate occasions, Pheils sent notice of the class action to potential class members without the court's having ordered or authorized him to do so, contrary to the mandate of Civ.R. 23(C)(2) and the law of the case in *Meek I*.[7] Although petitioner attacked this finding of the trial court in the Court of Appeals, that court confirmed that "nothing in the record reflects any action taken by the trial court . . . to order . . . [Pheils] to send the notice." Petition at 15. Whether or not the Court of Appeals was correct in affirming that finding, and whether or not that finding justified the sanction of removal of Pheils as class counsel, are purely matters of Ohio law, and pose no federal question. Thus, this Court could not grant Pheils the relief he seeks – reinstatement as class counsel – even if it accepted all of his trumped-up constitutional arguments. For this reason alone, a writ of certiorari should not be granted.

We turn now to the questions petitioner presents for review.

This is a Civ.R. 23(B)(3) class action, in which questions of law or fact common to the members of the class were found to predominate over questions affecting only individual members. In such class actions, Civ.R. 23(C)(2), like its federal counterpart, Fed. R. Civ. P. 23(c)(2), requires the trial court to direct the best notice practicable to advise prospective class members of their options.[8]

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[7] Petitioner has failed to disclose the existence of this independent sanction ground in his Statement of the Case. *See* Petition at 1-3.

[8] As the opinions of the courts below demonstrate, Ohio courts follow that body of federal law requiring the class

Proper class action procedures are critical to the maintenance of a class action. "It is clear . . . that the notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833-834 (3d Cir. 1973).

> [C]lass action procedures . . . can be tolerated . . . only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice. . . . The ultimate responsibility [for compliance with the procedural rules] . . . is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power.

Id. at 831-832.

Pheils's conduct here cannot be squared with the preeminent role Civ.R. 23(C)(2) assigns to the court in the class certification notice process. Consequently, the questions petitioner presents for review are designed to seek this Court's assistance in limiting trial courts' supervisory powers, particularly the power to take remedial action against class counsel who fails and refuses to play by the rules.

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certification notice to describe the proceedings accurately, in a neutral, objective tone not suggestive of the probable outcome of the case.

A. This Case Presents No First Amendment Free Speech Issue.

Attempting to invent a federal question, petitioner implies, at pages 5-6 of his Petition, that Ohio appellate courts have construed Civ.R. 23 as allowing Ohio trial courts to impose broad restrictions on communications from named plaintiffs and their counsel to prospective class members for mere prophylactic reasons, as the district court had done in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L. Ed.2d 693, 101 S.Ct. 2193 (1981).[9] That implication is untrue. *See* Petition at 16, wherein the court below stated:

> Finally, this court finds that appellants [sic] assertion that the trial court's actions were an infringement of First Amendment rights is without merit. The actions of the court did not constitute any prior restraint, as the communications had already occurred. In addition, the trial court did not impose the sanctions as a punishment for communicating with clients, rather it imposed the sanctions on attorney Pheils because attorney Pheils had demonstrated an unwillingness to conduct the case in a manner required by law, and an inability to adequately represent the class members.

What the courts below *did* do in this case was to construe Civ.R. 23 as authorizing Ohio trial courts to

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[9] *Gulf Oil, supra*, and *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (9th Cir. 1980), also cited by petitioner, are one and the same case. In the only other case cited by petitioner, *Domingo v. New England Fish Co.*, 727 F.2d 1492 (9th Cir. 1984), the Ninth Circuit simply applied this Court's *Gulf Oil* ruling in a case presenting a fact pattern like that in *Gulf Oil*. *Domingo* adds nothing to *Gulf Oil*.

supervise counsel's conduct in the class notice process and, if needed to protect the integrity of class action proceedings, to impose sanctions on wayward counsel. That construction of Civ.R. 23 is perfectly consistent with this Court's statement that "[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100.

Contrary to petitioner's implication, no ruling in this case is at odds with this Court's ruling that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil*, 452 U.S. at 101. Moreover, since no prior restraint order was ever issued in this case, it is not an appropriate vehicle for determining what standards are mandated by the First Amendment with respect to prospective limitations on communications from named plaintiffs and their counsel to class members. See *Gulf Oil*, 452 U.S. at 101, n. 15.

Petitioner's first question should not be accepted for review.

B. This Case Presents No Due Process Question.

The alleged federal question sought to be raised by petitioner's second question is whether the trial court's actions (inaccurately characterized by petitioner as the denial of information and advice from class counsel to

class members) deprived class members of "due process protected by the Fourteenth Amendment § 1 of the United States Constitution." Petition at 8. This due process question was neither raised in, nor passed upon by, any of the courts below. As a result, this Court lacks jurisdiction to consider the question. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), rehearing denied, 463 U.S. 1237, 77 L.Ed.2d 1453, 104 S.Ct. 33 (1983).

In addition, petitioner's second question lacks constitutional dimension. It merely attempts to attack the trial court's finding that the cover letter and questionnaire Pheils mailed with the 1991 Notice to prospective class members was misleading, as well as the Court of Appeals' holding that such a finding justified the trial court's conclusion that Pheils was no longer competent to represent the class. Whether or not the Court of Appeals was correct in so holding is a matter of state law relating to the supervisory powers of trial courts under the Ohio Rules of Civil Procedure. Simply reciting the mantra of the due process clause of the United States Constitution, as petitioner does at page 8 of the Petition, does not transform that question into one of federal law.

This Court cannot accept petitioner's second question for review.

C. This Case Does Not Involve Rules Governing Prior Restraints.

In yet another attempt to conjure up a federal question where none exists, petitioner contends that *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), somehow supports his position

that the First Amendment shields Pheils from sanctions for his misconduct here. *See* Petition at 9.

Apparently, the point of petitioner's third question is that, unless a message is judicially determined to be unprotected by the First Amendment before it is aired, the speaker cannot be punished for having promulgated it. Certainly, lawyers facing contempt charges for their courtroom outbursts would appreciate such a rule, but *Carlin* holds nothing of the kind. Rather, the court in *Carlin* applied the familiar rule that, absent prior judicial determination that a particular message is obscene, *prior restraint* of the message is unconstitutional. *See* 827 F.2d at 1296. *Carlin* is just another prior restraint case.

Pheils was never subjected to any threat of criminal prosecution or any other form of prior restraint. Therefore, the rules distinguishing lawful from unlawful prior restraints do not have any application in this case.

Petitioner's third question is not worthy of this Court's attention.

CONCLUSION

Meek's Petition should be denied for want of any substantial federal question.

Respectfully submitted,

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APPENDIX

RULE 23. CLASS ACTIONS

(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all

members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in Conduct of Actions. In the conduct of actions to which this rules [sic] applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to

come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(E) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(F) Aggregation of Claims. The claims of the class shall be aggregated in determining the jurisdiction of the court.

IN THE COURT OF COMMON PLEAS OF
OTTAWA COUNTY, OHIO

KEN MEEK, et al.,

Plaintiffs,

-vs-

GEM BOAT SERVICE, INC., etc.,

Defendants.

Case No. 24146

JUDGMENT ENTRY

(Filed Jan. 24, 1992)

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This matter is before the Court on defendant's motion for sanctions. The Court has before it memoranda filed by all parties and the arguments of counsel presented at oral hearing. This case, filed September 11, 1987 as a class action, has already been to the Court of Appeals once. For historical purposes there is no need to review or restate those matters covered by the Court of Appeals in its decision and journal entry dated September 14, 1990 (C.A.#89-OT-32), except to note that chief among the Court of Appeals' findings is (1) that no proper class had been created and (2) that no proper notice had been sent to prospective class members pursuant to Civil Rule 23(C)(2). The notice actually sent by Attorney for Plaintiffs was improperly prepared and was in fact "sent . . . without Court approval." Opinion, *supra* at page 8. The issue of sactions [sic] arises because defendant asserts that Attorney for Plaintiffs has yet again sent out an improper notice to the prospective class members. After remand from the Court of Appeals, this Court held a pretrial conference May 3, 1991 as a result of which a Pretrial Order was entered May 6, 1991 granting counsel for plaintiffs and defendant fifteen (15) days to prepare

and file their proposed notice to the class. Counsel for plaintiffs prepared his proposed notice, Exhibit A attached hereto. Defendant presented its proposed notice, Exhibit B attached hereto and subsequently the Court selected the Exhibit B notice and executed the same *but did not then order that it be sent or distributed by any party or person.* Nevertheless, attorney for plaintiff took it upon himself to send out the notice under cover of his personal stationery dated June 20, 1991 (Exhibit C attached hereto) and attaching thereto a four page questionnaire, so called, Exhibit D. The contents of the cover letter and questionnaire are a gross and egregious perversion of the requirements of objective notice set out in Civil Rule 23(C)(2) and of the objective notice selected by the Court. The actions of plaintiffs' counsel now places [sic] this case in the very same posture that it was in when the case came back from the Court of Appeals over two years ago. The requirement that the Court order the notice be sent by a party or by itself is a critical step in creating the class. A paragraph from the September 14, 1990 Court of Appeals Opinion aptly describes the case then, as now.

> There is nothing in the record, however, to indicate that a notice was sent to class members pursuant to Civ. R. 23(C)(2). The mandatory language of the rule indicates that the court must order that a notice be sent. However, we find nothing improper with the court ordering a party to send the notice. Accord, *Minnesota v. United States Steel Corp.* (D. Minn., 1968), 44 F.R.D. 559. Nonetheless, the record in this case does not contain an order from the court directing Meek to send such a notice.

> Therefore, we conclude that any notice prepared and sent was without court approval."

This turn of events is most disturbing and frustrating. If this case is ever to proceed to resolution, are we to send yet a third mailing to the potential class members? If we do eventually *order* a notice out, how do we explain in any meaningful way to the beleaguered class the prior two false starts? More troubling is how any revised notice can adequately and objectively inform the potential class of the status of the case and cleanse from their collective psyche the utter rubbish contained in the cover letter and questionnaire, Exhibits C and D. All the defenses and apologies raised by plaintiffs in their response to the motion for sanctions, including the First Amendment arguments, have no application because plaintiffs' attorney sent everything out before the Court ever ordered it! This is not a prior restraint on free speech, not a punishment for the exercise of free speech, nor an infringement upon the attorney/client relationship. Cf *Bernard v. Gulf Oil*, 619 Fed. 2nd 459, 1980. Even if the Court executed notice, without the order to deliver, could have been presumed by counsel to constitute some implied authority to notice, we still have the difficult problem of setting right the frame of mind of the potential class members and dispelling the self serving misrepresentations contained in the cover letter and questionnaire. Plaintiffs' counsel cannot assume that he is the one to notice the class because Civil Rule 23(C)(2) requires the Court to "direct to the members of the class the best notice practicable under the circumstances . . . " The Court may, as the Court of Appeals pointed out, empower *by order* a party to send notice, but plaintiffs' attorney acted before that

was ever done. The misleading contents of the cover letter of June 20, 1992 and of the questionnaire far exceed in attitude, bias and content the notice selected by the Court and the contents of notice prescribed by Civil Rule 23(C)(2).

As a sanction the Court, under its general equity powers, its inherent power to control the conduct of counsel, and as specifically authorized in Civil Rule 23, ORDERS that plaintiffs' attorney David R. Pheils, Jr. be removed from further representation herein, that he have no further participation in this case, that he pay the costs of these proceedings to date from remand from the Court of Appeals, including all costs related to the abortive second notice, and that he pay in addition as a sanction the sum of Five Hundred Dollars ($500.00) to defendants' attorneys as compensation for their time and expense incurred on the matter of notice and sanctions. See 1 Moore's Federal Practice, Manual for Complex Litigation, Article 30.24, 1986, and *Royal Indemnity Co. v. J.C. Penney Co.*, 27 O S 3rd 31, 1986, and cases cited therein.

Said attorney shall also pay the costs attributed to all curative measures deemed appropriate by the Court after new counsel enters the case.

Plaintiffs are hereby given 30 days leave to secure new counsel and have them enter an appropriate appearance in this case, whereupon the matter will be set for Pretrial and such other proceedings as are appropriate.

And this cause is continued.

/s/ Paul C. Moon
JUDGE